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No. 85-2156

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SHAARE TEFILA CONGREGATION, *et al.*,
Petitioners,

v.

JOHN WILLIAM COBB, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

ARGUMENT

NEITHER THIS COURT'S OPINIONS, THE LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT, NOR LAWS PROHIBITING RACIAL DISCRIMINATION IN OTHER CONTEXTS SUPPORT RESPONDENT'S ARGUMENT THAT PROOF OF A PLAINTIFF'S "RACE" IS A PREREQUISITE TO COVERAGE UNDER § 1982.

The critical error of respondent's argument, and of the Fourth Circuit majority, is its attempt to draw a distinction between race and the perception of race. The Fourth Circuit held the statute inapplicable where "a plaintiff is not a member of a racially distinct

group but is merely *perceived* to be so by defendants" (Pet. App. 6a (emphasis in original)). This statement assumes that racial differences are something that really exist in the world, that one could see, touch, and feel, rather than something merely perceived, *i.e.*, based on a definition created in the mind and described in language.[1] Respondent's argument should be rejected, and the Fourth Circuit's holding reversed, because the coverage of the 1866 Civil Rights Act is not dependent on some artificial definition of "race." The statute, instead, should be applied to all acts of racism, a construction that plainly accords with the language of the Act, its legislative history, and this Court's prior decisions. The admitted facts of this case show that it is a case of racism, and it accordingly should be covered.

A. This Court's Decisions Construing the Civil Rights Act of 1866 and the Legislative History of the Act Confirm that Its Protections Apply to Acts of Racial Discrimination and Do Not Require a Plaintiff to Prove that He or She Is "Racially Distinct."

Respondent attempts to denigrate petitioners' claim of racially motivated discrimination by dubbing it a "misperception theory." Respondent admits that he acted out of a belief that Jews are racially distinct

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[1] "To most people, a race is any group of people whom they choose to describe as a race." UNESCO, Statement on Race (1950). *Accord* S. Molnar, *Human Variation: Races, Types, and Ethnic Groups* 17 (2d ed. 1983) ("[j]ust what constitutes a race is a hard question to answer, because one's classification usually depends on the purpose of classification, and various approaches to taxonomy often have a built-in bias, especially when applied to humans").

and inferior,[2] but argues that his conduct is not actionable under § 1982 because his views about Jews were false. While the petitioners do not share respondent's completely erroneous view that they are racially distinct and inferior, petitioners reject the notion that the Civil Rights Act distinguishes between "true" and "false" racist doctrine and only covers acts of racism directed at members of "truly distinct" racial groups.

In *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 426 (1968), this Court made explicit that "§ 1 [of the Civil Rights Act of 1866] was meant to prohibit *all* racially motivated deprivations of the rights enumerated in the statute * * * " (emphasis in original).[3] The words

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[2] Respondent cannot hide behind a claim that the desecration was an act of religious discrimination. The Nazi and Ku Klux Klan symbols used by respondents make all too clear that it was racism, not religious zeal, that caused respondents to act. Moreover, respondents have admitted that they were motivated by racism. *See* Brief for Appellees, No. 85-1544 (4th Cir. filed Sept. 11, 1985) ("for purposes of this appeal, the defendants do not take issue with the plaintiffs' factual argument that defendants perceived Jews as racially inferior").

[3] Respondent argues that the force of this statement is somehow diminished by the fact that the Court held in *Jones* that private as well as public acts of racial discrimination are prohibited by § 1982. Brief for Respondent Remer at 20. The fact that the Court discussed racial motivation in the context of that holding means only that racially motivated deprivations of rights enumerated in the statute by public or private actors are equally actionable. It is difficult to understand what comfort respondent hopes to derive from the holding in *Jones*, since he is a private actor covered by that holding.

Respondent also criticizes petitioners' use of *Jones* as "misleading" because in their opening brief they did not quote the

"racially motivated" in this quotation were not used thoughtlessly by the Court, as respondent seems to suggest; the opinion stressed in other contexts as well that it was *racial discrimination* that the 1866 Act was intended to eradicate.[4] This Court followed the same rationale in holding, *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), that the statute protects whites who suffer racially motivated interference with rights protected by the Act. The Court reasoned that it is not the race of the victim that determines coverage but the existence of racial discrimination, a term used repeatedly in the opinion.[5]

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entire sentence, which goes on to state: "* * * although only those deprivations perpetrated 'under color of law' were to be criminally punishable under § 2." Brief for Respondent Remer at 20 n.12, quoting *Jones*, 392 U.S. at 426. The unquoted part of the sentence, dealing with criminal penalties under § 2 of the Act, does not in any way detract from the Court's point that "*all* racially motivated deprivations of the rights enumerated in the statute" were intended to be covered.

[4] *E.g.*, 392 U.S. at 434 ("[t]o Congressman Cook and others like him, it seemed evident that, with respect to basic civil rights—including the 'right to * * * purchase, lease, sell, hold, and convey * * * property,' Congress must provide that 'there * * * be *no* discrimination' on grounds of race or color (footnote omitted) (emphasis in original)); *id.* at 434 ("[w]hen the House passed the Civil Rights Act * * * it did so on the same assumption that had prevailed in the Senate: It too believed that it was approving a comprehensive statute forbidding *all* racial discrimination affecting the basic civil rights enumerated in the Act" (emphasis in original)).

[5] *E.g.*, 427 U.S. at 276 ("we must decide whether § 1981 * * * affords protection from racial discrimination in private employment to white persons as well as nonwhites"); *id.* at 287 ("we cannot accept the view that the terms of § 1981 exclude its application to racial discrimination against white persons"); *id.* at 288 ("the terms of the bill prohibited any racial discrimination

In *General Building Contractors Association* v. *Pennsylvania*, 458 U.S. 375 (1982), this Court reinforced its statements in *Jones* that racially motivated deprivations of protected rights trigger the coverage of the Civil Rights Act. In *General Building Contractors*, the Court held that § 1981 "can be violated only by purposeful discrimination" and does not protect against acts that are racially neutral in motivation but that have a disparate impact.[6] In support of its holding, the opinion for the Court underscored the words "racially motivated" in the *Jones* Court's statement that "§ 1 of the 1866 Act 'was meant to prohibit *all racially motivated* deprivations of the rights enumerated in the statute.' "[7]

All of these holdings are thoroughly grounded in the language and legislative history of the 1866 Act. By its terms, § 1982 protects "all citizens." Congress did not limit the Act's protection to some particular group of races, but cast it in terms that would assure that "the very object and effect of the section is to prevent discrimination."[8]

The argument advanced by respondent in this Court assumes that a defendant's conduct cannot be racially motivated unless the plaintiff proves that he or she

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in the making and enforcement of contracts against whites as well as nonwhites").

[6] 458 U.S. at 391.

[7] 458 U.S. at 388 (emphasis in original), quoting *Jones*, 392 U.S. at 426.

[8] Cong. Globe, 39th Cong., 1st Sess. 1758 (1866) (remarks of Sen. Trumbull, author of the 1866 Act). *See generally* Brief for Petitioners at 19-23, regarding the legislative history of the 1866 Act.

is a member of a "distinct race."[9] The fundamental defect in that argument is revealed by respondents'

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[9] The holdings in *Al-Khazraji* v. *Saint Francis College*, 784 F.2d 505 (3d Cir.), *cert. granted*, 107 S. Ct. 62 (1986) and *Alizadeh* v. *Safeway Stores, Inc.*, 802 F.2d 111 (5th Cir. 1986) do not support respondent's theory. In *Al-Khazraji*, the plaintiff alleged discrimination on the basis of his Arab ancestry. The Third Circuit recognized that the plaintiff was "taxonomically classified as a member of the Caucasian race," 784 F.2d at 515, but cited *McDonald* for the proposition that whites "who have been victims of racial discrimination can sue under Section 1981." *Id.* The court held that plaintiff stated a claim because the discrimination alleged was "the sort of discrimination proscribed by Section 1981." *Id.* (footnote omitted). The Third Circuit observed that "Congress's purpose was to ensure that all persons be treated equally, without regard to color or race, which we understand to embrace, at the least, membership in a group that is ethnically or physiognomically distinctive." *Id.* at 517 (footnote omitted). In some cases, as the Third Circuit suggests, evidence that discrimination is racial could be provided by demonstrating that the plaintiff's color renders him or her vulnerable to racial discrimination. The Third Circuit did not suggest that as the exclusive test, nor should it be. Where, as here, racial motivation is admitted and is clear from the Nazi and Ku Klux Klan character of the discrimination, there should be no question under the *Al-Khazraji* court's analysis that petitioners are protected.

The same is true of *Alizadeh* v. *Safeway Stores, Inc.* The plaintiff in *Alizadeh* is white, and claimed protection against racial discrimination under § 1981 because her husband, an Iranian, was considered by defendants "as a member of a race other than White." 802 F.2d at 113. The court in *Alizadeh* defined the issue as "whether a woman who is married to an Iranian and who has been discriminated against because her husband is considered by a prejudiced person to be nonwhite is entitled to the protection of § 1981." *Id.* at 114. The court recognized that "[a]nthropologists classify Iranians as Caucasians" but held that "we do not think that a taxonomical definition of race is in keeping with the rationale of *McDonald*."

own conduct—an attack on plaintiffs that was admittedly motivated by the Nazi and KKK ideology that Jews are racially distinct and inferior. The argument that victims of such racial discrimination should be denied the remedies provided by a statute prohibiting racial discrimination should be rejected, because (1) this Court should not close its eyes to the reality of the racial discrimination before it, and (2) the federal courts should not take on the odious function of determining the race of plaintiffs in civil rights cases.

Respondent's argument focuses on the words "race" and "color" in this Court's opinions and in the legislative history as the basis for his argument that a plaintiff must prove his race or color. But this Court has never required that proof. On the contrary, it has regarded purposeful discrimination—the intent of the discriminator—as the touchstone of coverage. *General Building Contractors*. That is why, for example, in *Tillman* v. *Wheaton-Haven Recreation Association*, 410 U.S. 431 (1973)[10] and *Sullivan* v. *Little Hunting*

Id. at 114-15. The Court relied on *Al-Khazraji* in holding that *Alizadeh* stated a claim. *Accord Jatoi* v. *Hurst-Euless-Bedford Hosp. Auth.*, 807 F.2d 1214 (5th Cir. 1987) (in holding that East Indian stated a § 1981 claim, citing *Alizadeh* for the proposition that the circuit has refused to limit the protection of § 1981 to taxonomically defined racial groups).

[10] Respondent attempts to minimize the significance of *Tillman* by arguing that this "Court remanded to the district court the issue whether the white plaintiffs successfully could challenge the adoption of a guest policy that excluded their black guests," Brief for Respondent Remer at 23 n.14, as if this Court had some doubt that the white plaintiffs could state a claim. In fact, the Court expressed no such doubt. The district court was directed on remand to develop the facts and "evaluate the claims

Park, Inc., 396 U.S. 229 (1969), the Court held that the Act applies to whites who suffer from racism because of their advocacy of the rights of blacks.[11] Eradication of racial discrimination and its effects would not be well served by permitting respondents, who admit their racist notions about Jews, to escape the application of federal law because their racist views are so completely wrong.

B. The Other Protections Against Discrimination Cited by Respondent Do Not Support His Claim that Federal Law Establishes Racial Categories that Can Be Imposed on § 1982.

To succeed in stating a § 1982 claim under respondent's test, a plaintiff would have to allege membership in a "racially distinct" group that has somehow been predetermined to be a "racial group" protected by the statute. Respondent does not offer a list of protected races, but only suggests that com-

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of the parties free of the misconception that Wheaton-Haven is exempt from §§ 1981, 1982, and 2000a." 410 U.S. at 440 (footnote omitted). On remand, the Tillmans prevailed and were awarded damages for the injuries they suffered when their black guests were denied admission by Wheaton-Haven. *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 367 F. Supp. 860 (D. Md. 1973).

[11] Respondent undercuts his own argument that it is the supposed actual racial classification of a plaintiff that determines the coverage of § 1982 by suggesting that petitioners could strengthen their claim under § 1982 if they alleged that Jews are a racial group. Brief for Respondent Remer at 5. Jews are not a racial group, and it would make no sense to hold that they could claim coverage under § 1982 if they were willing to make allegations contrary to fact. The racial prejudice against Jews and the indignities they suffer would only be intensified by requiring them and other groups to allege and prove "racial distinctness" in order to obtain the protection of federal law.

pilation of such a list would be easy because federal courts and agencies supposedly have done it in other contexts. *See* Brief for Respondent Remer at 27-30. In fact, the racial categories described by the United States government for different purposes vary considerably, have changed over time, and shed no light on the proper coverage of the Civil Rights Acts. The sources cited by respondent are excellent examples of why judicial legislation of a list of protected races is not only repugnant but unworkable.

Respondent claims that Title VII of the Civil Rights Acts of 1964, 42 U.S.C. § 2000e-2000e-17 (1982), which protects against discrimination in employment based on national origin, religion, color, and gender as well as race, is a "visible example of modern permissible racial classification." Brief for Respondent at 27. Respondent has not cited a single case, however, in which the Equal Employment Opportunity Commission ("EEOC") or a court has presumed to resolve a factual dispute concerning a plaintiff's race in determining that plaintiff's entitlement to protection under Title VII.[12]

Moreover, contrary to respondent's claims, even in disparate impact cases, the courts have not focused on proof of the race or other group membership of a plaintiff. It is simply not the case, as respondent claims, that proof of membership in "a racial minority" is a prerequisite for Title VII coverage where a plaintiff alleges racial discrimination. *See* Brief for

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[12] The EEOC has promulgated no regulations that require a plaintiff to prove his or her "race," define that term, or specify how a claimant would prove "race."

Respondent Remer at 28.[13] Instead, the courts have looked at the discriminatory intent of the defendants to determine coverage.[14] In fact, in cases in which discriminatory intent has been absent because defendant did not know about the group membership of plaintiff that allegedly gave rise to disparate treatment, Title VII protection has been denied.[15]

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[13] Respondent cites the discussion in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973), for the proposition that proof of membership in "a racial minority" is the first prong of a four-part test required to establish a Title VII claim. Respondent neglects to explain, however, that the Court introduced that discussion by saying a complainant "may" establish a prime facie case by showing those elements. *Id.* Since *McDonnell Douglas*, this Court has made abundantly clear that the elements of a prima facie case described there were not exclusive. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 358 (1977) (footnote omitted).

[14] *See Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 253-56 (1981); *Earnhardt* v. *Puerto Rico*, 582 F. Supp. 25, 27 (D.P.R. 1983) *aff'd*, 744 F.2d 1 (1st Cir. 1984) (claimant met his burden of proof under Title VII by showing "that he was the only member of a group * * * classified as distinct and different by the other employees and supervisors"). In disparate treatment cases as well the lower courts have focused on the defendant's discriminatory intent, and not on the plaintiff's membership in a "protected group" to determine the coverage of the statute. *See Clark* v. *Atchison, Topeka & Santa Fe Railway Co.*, 731 F.2d 698, 702 (10th Cir. 1984); *Smith* v. *Honeywell, Inc.*, 735 F.2d 1067, 1068-69 (8th Cir.), *cert. denied*, 469 U.S. 1077 (1984).

[15] For example, in *Nieves* v. *Metropolitan Dade County*, 598 F. Supp. 955 (S.D. Fla. 1984), the plaintiff stated on his employment application form that he was Caucasian but claimed in his Title VII allegation that he was Hispanic, and was not promoted for that reason. The court made no effort to determine whether the plaintiff was Caucasian or Hispanic, but instead

As respondent points out, the EEOC now requires employers "to categorize their workforce either as White, Black, Hispanic, Asian or Pacific Islander, or American Indian or Alaskan Native," Brief for Respondent Remer at 29, but the EEOC does not proffer these categories as determinative of the coverage of the statute. In fact, in 1977, the EEOC reclassified natives of India from the "White" category to the "Asian or Pacific Islander" category.[16] The reclassification was not based on any change in the natives of India, but on ease of federal record-keeping.[17]

The fact that the federal government uses different categories for purposes other than Title VII further undermines respondent's claim that such categories can readily be used to define the coverage of § 1982. For example, for census purposes the federal gov-

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rejected plaintiff's claim for lack of discriminatory intent because "it is difficult to see how [the defendant] could have discriminated against [the plaintiff] on [the basis that plaintiff is Hispanic] if he was never made aware of the fact." 598 F.2d at 962. *Accord EEOC* v. *Circus World, Inc.*, No. 85-648-CIV-ORL-18 (Dec. 4, 1986) (Title VII claim of discrimination based on plaintiff's pregnancy dismissed at end of plaintiff's case for lack of proof that employer knew plaintiff was pregnant when he decided to discharge her).

[16] EEOC, *Government-Wide Standard Race/Ethnic Categories*, 42 Fed. Reg. 17,900 (1977).

[17] The categories used by the federal government for immigration purposes have changed dramatically over the decades. *See* Appendices A and B to Brief for Respondent in *Saint Francis College* v. *Al-Khazraji*, No. 85-2169 (filed Jan. 23, 1987). These appendices catalogue "racial classifications" utilized by the Bureau of Immigration and Naturalization from 1899 until the 1930s and the Racial Tables in Annual Reports of the Commissioner General of Immigration from 1900 to 1932.

ernment uses a different set of categories of "race": White, Black, American Indian, Eskimo, Aleut, Japanese, Chinese, Filipino, Korean, Asian Indian, Vietnamese, Hawaiian, Guamanian, Samoan, and "Other."[18] For purposes of administering the Local Public Works Capital Development and Investment Act, "minority group members" are defined as citizens of the United States who are "Negro, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut."[19]

The other statutory and judicial protections mentioned by respondent are no more persuasive in support of his theory that racial definitions are widely recognized in federal law. Respondent argues that what he calls "[t]he racial animus requirement under 42 U.S.C. § 1985(3), the civil rights statute prohibiting conspiracies denying equal protection of the laws and equal privileges and immunities under the laws, is established by reference to racial classification. *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971)." Brief for Respondent Remer at 29-30. However, in *Griffin* and in *United Brotherhood of Carpenters and Joiners, Local 610* v. *Scott*, 463 U.S. 825 (1983), the Court's more recent discussion of § 1985(3), the Court repeatedly described the coverage of the statute in terms of animus or motivation, and not in terms of particular racial or other groups it protects.[20] This Court re-

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[18] U.S. Department of Commerce, Bureau of the Census, *1980 General Population Characteristics United States Summary*, Table 38 (1983).

[19] 13 C.F.R. § 317.2 (1986).

[20] *E.g.*: "Although we have examined with some care the legislative history that has been marshalled in support of the position that Congress meant to forbid wholly non-racial, but

cently relied on *Griffin*'s requirement of "invidiously discriminatory animus behind the conspirators' action," 403 U.S. at 102, to support its holding in *General Building Contractors* that such intent is required under the successors to the 1866 Civil Rights Act. *General Building Contractors*, 458 U.S. at 390 n.17.

This Court's cases under the Fourteenth Amendment also fail to support respondent's argument that proof of membership in a "race" is a prerequisite of a claim. It is ironic that respondent relies on *Washington* v. *Davis*, 426 U.S. 229 (1976) for the proposition that "[c]hallenges to race discrimination under the Fourteenth Amendment's equal protection clause require reference to the parties' racial identities in determining whether a violation has occurred." Brief for Respondent Remer at 29. During the last decade, beginning with *Washington* v. *Davis*, the Court has focused increasing emphasis on discriminatory intent as the *sine qua non* of equal protection analysis under the Fifth and Fourteenth Amendments.[21] This Court

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politically motivated conspiracies * * * ." *Scott*, 463 U.S. at 836; "We thus cannot construe § 1985(3) to reach conspiracies motivated by economic or commercial animus." *Id.* at 838; "The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment." *Griffin*, 403 U.S. at 102; "We need not decide * * * whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of § 1985(3) before us." *Id.* at n.9.

[21] *See Memphis* v. *Greene*, 451 U.S. 100, 119 (1981); *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 464 (1979); *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 260, 274 (1979).

has not defined "race" under the Fifth and Fourteenth Amendments and there is no need for it to do so because its analysis focuses, as it should here, on discriminatory intent regardless of the actual race of its target.[22]

Respondent's citations to these other sources of protection against discrimination fail to support his claim that definitions of race are prevalent under federal law. Moreover, they suggest the potential pernicious effects of a holding here that some proof of a plaintiff's racial group must be established as a prerequisite to § 1982 coverage. Such a holding would be an open invitation to defendants in cases brought under these other statutes and constitutional provisions to challenge the race of the plaintiff. In our pluralistic society, such challenges inevitably would degenerate into efforts to determine, for example, how many black grandparents a black plaintiff must have in order to sustain a race discrimination claim. Such sideshows would involve the federal judiciary in

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[22] The same is true of the Voting Rights Act and Title VIII. The Voting Rights Act protects against discrimination based on linguistic characteristics as well as race and color. 42 U.S.C. §§ 1973, 1973b(f)(2). Title VIII of the Civil Rights Act protects against discrimination in the sale or rental of housing "to any person because of race, color, religion, sex, or national origin." 42 U.S.C. § 3604(a)(1982). Respondent cites no cases supporting the notion that the "race" or "color" of plaintiffs is tested by the courts under these acts, because the courts simply have not done so. The affirmative action cases cited by respondent at page 30 of his Brief do not support his theory either. Although this Court has approved the use of racial classifications in remedies in some circumstances, it certainly has not defined the races involved or constructed tests to determine how individuals can be categorized by race.

the wholly inappropriate task of defining race, and do nothing to stem discrimination.

C. Coverage of Petitioners' Claim Under § 1982 Will Make Clear that the Protection of Federal Law Is as Extensive as Racially Based Violations of the Rights Protected by the Statute.

Respondent argues that the Congregation's construction of § 1982 will "infinitely expand[ ] the scope of the civil rights laws." Brief for Respondent Remer at 30. That is not the case. Petitioners do not contend that all acts of discrimination, regardless of their character and motivation, should be covered by § 1982. In accordance with this Court's precedents, coverage applies only to racially motivated conduct.

Proof of racial motivation does not require reference to some "objective race standard," as respondent claims. Brief for Respondent Remer at 31. As demonstrated in the opening Brief for Petitioners at 24-30, anthropologists increasingly reject the notion that there are such categories. The task of sorting out racial motivations from other motivations is no different from assessing intent in other contexts, which finders of fact do routinely and in many instances with severe consequences. A finder of fact must always look at factors such as admissions and statements, the surrounding circumstances, and the historical context to determine what motivated an actor.[23] Respondent criticizes use of such factors be-

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[23] The *amici* brief filed by the Anti-Defamation League of B'nai B'rith and others (the "ADL") articulates factors that could be used by the lower federal courts:

> There are numerous factors—none of which is exclusive—that the courts should consider in determining whether a

cause they may include consideration of a plaintiff's own allegations of his race or color. This is a far cry from asking a court to determine the race or color of a plaintiff. Certainly a black plaintiff should be able to allege that he is black and that the discrimination against him was racial. In some cases, the conduct itself makes clear the racial motivation. A cross burning, emblematic of the Ku Klux Klan, is unmistakable as a racist act. An assault on the street of a black by a white also carries a racist implication if, for example, it was preceded by racial epithets or a history of such harassment. A finder of fact can be trusted to weigh the difference between that and a mugging motivated by a desire for money.

It is more in keeping with the proper role of the federal courts for finders of fact to weigh the intent of defendants than to determine the race of plaintiffs. There is simply no reason to believe that this approach to construction of § 1982, which was urged

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plaintiff has adequately pleaded and can plausibly assert that he was the victim of *racial* discrimination, as opposed to discrimination on some other basis not prohibited by the statute. The factors to be considered should include the plaintiff's allegations concerning the racial or racist motivations of the defendant. In addition, the court should weigh the plaintiff's allegations regarding his own race or skin color. Equally important factors are the extent to which the plaintiff belongs to an identifiable group that is commonly or historically regarded by bigots or lay persons as constituting a "race," as the term is understood in a broad sense. Unless the plaintiff's allegations are inconsistent with the notion that he or she has suffered discrimination that is racial or racist in character, a cause of action has been stated and the plaintiff should be entitled to prove his or her claim. [Brief of the Anti-Defamation League of B'nai B'rith, *et al.*, at 21 (emphasis in original).]

below by Judge Wilkinson in dissent, would flood the federal courts or undercut the role of state courts. It is significant that the State of Maryland has acknowledged in this Court that "the available Maryland state law remedies do not afford appropriate redress for the true nature and magnitude of the injury actually inflicted." Brief Amicus Curiae the State of Maryland at 3. The state is not at all concerned that its power or activity in this area may be diminished; it urges this Court to reverse the Fourth Circuit and afford the protection of § 1982 to petitioners.

CONCLUSION

For all the foregoing reasons and those stated in petitioners' opening brief, the decision of the United States Court of Appeals for the Fourth Circuit should be reversed, and the Congregation should be given the opportunity to prove its claims under 42 U.S.C. §§ 1982 and 1985(3).[24]

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[24] Respondent appears to suggest, on the basis of language in two concurring opinions to this Court's decision in *Great American Fed. Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 379, 385 (1979), that the Congregation's § 1985(3) claim will not survive even if this Court overturns the Fourth Circuit's § 1982 holding. Brief for Respondent Remer at 8 n.5. The majority opinion in *Novotny* did not reach the issue whether § 1985(3) encompasses federal statutory rights, although the dissenting opinion argued persuasively that such rights were within the scope of the statute. 442 U.S. at 388 & n.5 (White, J., dissenting). The Court likewise declined to resolve the issue in *United Brotherhood of Carpenters & Joiners, Local 610* v. *Scott*, 463 U.S. at 832-33. Respondent correctly acknowledges that the Fourth Circuit previously has indicated that § 1985(3) encompasses federal statutory violations. *See McNutt* v. *Duke Precision*

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Dental & Orthodontic Laboratories, Inc., 698 F.2d 676, 679-80 (4th Cir. 1983). Indeed, respondent Remer conceded below that "[t]he rights protected by § 1985(3) are [applicable] to federal statutory and constitutional rights." (J.A.20) On the present record, in the event this Court reverses the Fourth Circuit's § 1982 holding, it should remand the case for reinstatement of the § 1985(3) claim.